FOR ARGUMENT

No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The principal argument of our opening brief was that, whether or not the Parole Commission has changed the way in which it evaluates applications for release, the decision to have one set of principles for evaluation rather than another has been committed by Congress to the Commission, and that judges therefore cannot revise sentences when the Commission changes its approach or when judges are surprised to learn how the Commission has applied its approach to a particular case. The briefs of respondents and amicus do not come to grips with our reasoning: they argue, in the main, that because the Commission has changed its approach, it must follow that

district judges can change their sentences. We believe that our opening brief establishes that respondents' conclusion does not follow from their premise. It is important, nonetheless, to understand that respondents' premise is itself unfounded.

Our opening brief describes the sentencing and parole release system, the changes that took place in 1973, and the fact that the implementation of a guideline system was intended to produce greater consistency in decision making rather than to introduce new substantive criteria (Br. 24-31, 50-55). Our brief buttressed the submission that the Commission had been evaluating the seriousness of the offense long before 1973 by describing statistics, gathered by the staff of the National Commission on Crime and Delinquency between 1969 and 1972, which show that less than half of first offenders with satisfactory prison records were released at or soon after the completion of one-third of their sentences (Br. 55 n.47). Indeed 29.9% of all first offenders sentenced under what is now 18 U.S.C. 4205(a) were not released on parole at all but were held until mandatory release. The fact that the Commission chose not to release respondents at the one-third point therefore is not unusual, and it would not have been unusual in 1970 or 1972, when respondents were sentenced.

Respondent Addonizio offers principally an anecdotal response to this: he argues, essentially, that "everyone knows" that well-behaved prisoners were released automatically at the expiration of one-third of their sentences. The simple answer is that the Commission was not responsible for any such impression, if it existed. Both by word (see pages 51-58 & nn.42, 43 of our opening brief) and deed (*id.* at n.47) the Commission let bench and bar know that release was far from automatic and that the nature of the offense was taken into account. If some judges did not know this—and if defense counsel did not let judges know—they have themselves rather than the

Commission to blame. As we argued in our opening brief, judicial surprise when the effect of the Commission's policies is felt in a particular case is not a sufficient reason to revise a lawful sentence.

Respondent Addonizio buttresses his anecdotal approach with statistics that, he maintains (Br. 30 n.22), refute the data contained in note 47 of our brief. He makes four arguments, which we address in turn.

Addonizio first argues that the data should be disregarded because they were not available at the time Addonizio was sentenced. This misses the point. We offered the data simply to show that, at the time respondents were sentenced, there was no rule of presumptive release at the one-third point; consequently the absence of such a rule in the Commission's current practice is not a radical change. That point does not depend on the fact that the data did not become available until after respondents' sentences were imposed.

Second, respondent states that the data in note 47 misleadingly encompass the entire federal prison population. Because prisoners with short sentences routinely were held until expiration, Addonizio maintains, the aggregate data overstate the degree to which prisoners with long sentences were denied release on parole. This retort may be based on the lack of a full explanation of the data provided in our brief. In fact, the data refer only to persons with sentences of one year or more; prisoners with truly short sentences were excluded from the compilations. At all events, respondent's submission concedes part of our point: many prisoners were held after the one-third point and were not routinely released.

Third, respondent argues that the figures do not take into account the fact that some prisoners were released shortly after the one-third point, and so they understate the proportion of prisoners granted early release. Here, too, the lack of full description in the footnote may have

caused a misimpression. The National Commission on Crime and Delinquency's figures treat any prisoner who was released within two months of the one-third point as having been released "at" the one-third point. The data therefore take Addonizio's observation into account.

Finally, respondent contends that the data given in note 47 contradict data in the United States Board of Parole, *Biennial Report* (1968-1970) of the Commission. The 1968-1970 *Report* shows, according to Addonizio, that parole was on the average granted after service of 36.3%, or approximately one-third, of the sentence. This figure apparently comes from Table XIII of the *Report*. (Table XII also shows that persons who received parole from white collar crimes were released, on average, after 40.1% of their terms.)

Respondent has misread Table XIII. That table pertains only to time served by prisoners who were in fact paroled, not to time served by all prisoners. Table X of the same report (page 20) discloses that 54.5% of all adult prisoners (and 59% of adult prisoners serving regular sentences) never received parole. That is, from mid-1966 to mid-1970 more than half of all adult prisoners were held until mandatory release on good time credits. Far from supporting respondent, the data in the *Report* strongly support the Commission's position here: at the time of respondents' sentences, the Commission had no settled course of practice of releasing prisoners at the one-third point. Denial of parole was the rule, not the exception.[1]

[1]Table XIII is not as helpful to respondents as it seems, even within its limited coverage. That table includes data from persons serving sentences under what is now 18 U.S.C. 4205(b)(2), who were eligible for release before the one-third point. When the data are broken down so that early releases are excluded, and only persons sentenced, as respondents were, under Section 4205(a) are included, then the pattern described in note 47 of our brief emerges.

Amicus Lewisburg Prison Project makes a different response to the available data. Amicus first contends (Br. 25) that another analysis of the same data shows that "the probability of parole was greatest" during the period between 31% and 50% of the sentence imposed. We do not dispute this finding, although it produces an apples-and-oranges problem when compared with the data in note 47 of our brief. (Most parole *releases* can fall between 31% and 50% of sentences even if most people are not released at all. Like Table XIII of the 1968-1970 *Report*, the data discussed here do not take into account persons who were denied parole.)

It is important to recognize, however, that a discussion of probabilities of release is simply a way of describing (using the standard deviation of release dates) the period within which a given proportion of release takes place. If two-thirds of all parole releases occur within the 31% to 50% range, another one-sixth occurs after 50%. Taking the position of amicus as a given, then, a judge should have expected a substantial number of all prisoners to be held in jail for more than half of their sentences. The fact that respondents were so held[2] thus does not prove that any change of policies has occurred; it shows only that the Commission believed that they were among the inmates deserving to serve the greatest proportion of their sentences.

Amicus also objects (Br. 28-33) to consideration of the Commission's release decisions in cases involving

[2]The data relied on by amicus are less helpful to Whelan and Flaherty than they are to Addonizio. The Commission decided to hold Addonizio until mandatory release. Whelan and Flaherty, however, began serving their 15-year sentences in 1971, and the Commission tentatively decided to release them in 1978, after they had served less than half. The district court reduced Whelan's and Flaherty's sentences before the Commission could decide whether to require them to serve any additional portion of the sentences.

prisoners sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010, as a basis for specifying some of the criteria spelled out in the Commission's current guidelines. We do not understand the relevance of this point. Amicus apparently believes that the Commission should not have been applying in Youth Corrections Act cases the same criteria it used in regular adult cases, and that a study based on Youth Corrections Act prisoners therefore is improper. But it is unnecessary for the Court to consider what criteria the Commission *should* have been applying in Youth Corrections Act cases long ago. The Commission was in fact applying its usual criteria, and amicus does not contend otherwise.[3] As we shall show, youth cases were not only appropriate, but were the best available class of cases for study.

The study, which was conducted by the National Council on Crime and Delinquency (not by the Commission, as amicus states), focused on Youth Corrections Act sentences because that statute left the Commission almost entirely free to make decisions, unfettered by minimum sentences or varying mandatory release dates. Most Youth Corrections Act sentences were for six years' imprisonment. Such sentences therefore were ideal for research to determine what factors the Commission was taking into account. Regular adult cases might mask the factors: if there was a minimum time of service before parole eligibility, the Commission might be forbidden to release a prisoner who it would otherwise have released under the Commission's approach, and the disparity in maximum terms might have required the

[3]It is now clear that the Commission may apply its usual release procedures and guidelines to persons sentenced under the Youth Corrections Act. See 18 U.S.C. 5005, 5017(a); *De Peralta* v. *Garrison*, 575 F. 2d 749 (9th Cir. 1978). The Commission has elected, however, to employ a special set of guidelines in these cases to take account of the fact that there is a uniform maximum sentence of six years. See 28 C.F.R. 2.20

Commission to release someone who would not have been paroled if the Commission retained discretion in the matter. The indeterminate nature and uniform length of the Youth Corrections Act sentences made it possible to isolate the results of the Commission's approach to decisionmaking from the results produced by statutory minimum and maximum terms.

At all events, as we have pointed out (Br. 59), this case does not turn on the content or source of the guidelines. Respondents were denied release even though that caused them to be confined longer than the guidelines indicate is usual. Nothing in the nature of the sample of cases that was studied to produce the particular content of the guidelines affects this case. Indeed, if, as amicus contends, the content of the guidelines is colored by their derivation from Youth Corrections Act cases, that might simply influence the guidelines in the direction of leniency. The derivation does not show that there has been a radical change in the Commission's practices or that, until 1973, the nature and seriousness of the offense were ignored in making release decisions.

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
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